IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 49 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAJENDRASINH BAHADURSINH ZALA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 49 of 1998
MR PM VYAS for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
MR KT DAVE, APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE M.S.SHAH

Date of decision: 05/03/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

The appellant-accused has filed this appeal

through jail and challenged the impugned judgment and order of conviction and sentence dated 23.12.1997 passed by the learned Additional Sessions Judge, Court No. 10, Ahmedabad in Sessions Case No. 38 of 1997 whereby the learned Judge convicted the appellant-accused for the offence under Section 302 IPC for committing murder of Narendrasinh and sentenced him to suffer life imprisonment and to pay a fine of Rs.500/- in default to further undergo RI for one month. The learned Judge also convicted the appellant-accused for the offence under Section 324 IPC and sentenced him to suffer one year RI and to pay a fine of Rs.250/- in default to further undergo 15 days RI. Both the sentences are ordered to run concurrently.

2. As per the prosecution case, on 19.9.1996, at about 11 P.M., the complainant and deceased-Narendrasinh were going towards their home on separate bi-cycles. At that time, the accused was waiting for them near Hatkeshwar area and when the deceased and his father, i.e. the complainant, approached the spot, a push was given by the accused to Narendrasinh and immediately he had given blow of knife on the vital organ of deceased-Narendrasinh. The complainant had tried to intervene and had taken hold of the knife and it is the case of prosecution that he was also injured in the scuffle. The deceased was shifted to the hospital, at hospital Wardhy was taken by the constable on duty and has informed the police station and then the complaint was taken by the police at hospital. Thereafter dying declaration was recorded and after completion of the investigation the accused has been charge sheeted for the offence under Sections 302, 324 IPC alongwith the offence under Section 135(1) of the Bombay Police Act.

3. The learned Magistrate committed the case against the accused to the Court of Sessions. The accused was admittedly poor, therefore, not engaged any advocate to defend the case before the Sessions Court. Under the circumstances, the learned Judge appointed Senior Advocate Shri IM Munshi to defend him in sessions case by providing legal aid. Thereafter, the learned Judge framed charge against the accused at Exh. 1 for the offences under Sections 302 and 324 IPC for committing murder of deceased Narendrasinh and causing simple injuries with deadly weapon like knife to eye witness Andubha Vajesingh (complainant). The accused did not plead guilty to the charge and claimed to be tried. Therefore, to prove its case, the prosecution examined as many as 12 witnesses including two eye witnesses Andubha Vajesingh (complainant) PW 1 (Exh.15) who lodged the FIR

(Exh. 16) and one Dalsukhbhai Haribhai PW 2 (Exh. 17). Dr Patel who performed the post-mortem was examined at Exh. 48. Police Inspector Shri RP Bhatt who investigated the case was examined as PW 10 at Exh. 39. He has produced the yadi (Exh. 28) sent to the Executive Magistrate, PW 6 (Exh. 27) who was examined to prove the dying declaration of deceased-Narendrasinh which was recorded by him on 20.9.1996. The prosecution has examined other witnesses as panch witness, etc. and also relied upon the documentary evidence like panchnama of the scene of offence, panchnama of recovery of weapon, etc.

4. Considering the oral as well as documentary evidence led by the prosecution and the defence of the accused, the learned Judge came to the conclusion that the prosecution proved its case against the accused beyond reasonable doubt and, therefore, convicted the accused for the offences under Section 302 as well as Section 324 IPC and sentenced him as stated earlier.

5. The learned Judge has relied upon the dying declaration made by deceased-Narendrasinh before the Executive Magistrate on 20.9.1996 for convicting the appellant-accused under Section 302 IPC. The dying declaration of deceased-Narendrasinh is at Exh. 29. It is in question and answer form. Learned Magistrate Shri Patel started recording the dying declaration of deceased-Narendrasinh on 20.9.1996 at 3.45 P.M. which was over at 4.00 P.M. When the deceased was asked that when and where the incident took place, he stated that the incident took place on 18.9.1996 at about 11.45 PM near Hatkeshwar circle. When he was asked that with what weapon the injuries were caused, he stated that with knife. When he was asked to narrate the incident in brief, he stated that when he was going to his house from the galla of his brother-in-law (sister's husband-Dilipsinh), at that time, Rajendrasinh Zala (accused) was standing near Hatkeshwar circle. He was going on a bi-cycle, therefore, he had not noticed. At that time, Rajendrasinh pushed him. Alongwith him (Rajendrasinh), another person was also there. Rajendra gave knife blow on his stomach. His father was following him. He caught Rajendra (accused), but he managed to escape. When asked that on which portion of his body blow was given, he stated that knife blow was given on his stomach. He did not know who was the another person with him. He was brought to the hospital by his father. When asked that who gave knife blow to him, he stated that Rajendra gave knife blow to him. Rajendra assaulted him with knife. Thereafter, he was asked a specific

question - "whether prior to the incident any altercation or quarrel took place ?". He stated that Rajendra is the brother-in-law of his sister; earlier, he had threatened not to come to his sister's place at Kailash Colony and if he comes, then he will kill him.

6. Below the aforesaid dying declaration of deceased-Narendrasinh, the Executive Magistrate made an endorsement to the effect that at the time of recording the dying declaration, no one from the police was kept present and relative of the patient was also not kept present and he verified that the patient was conscious.

7. From the evidence of the Executive Magistrate Shri Patel PW 6 (Exh.27), it is clear that before recording the dying declaration of deceased-Narendrasinh, he had not met any doctor in the hospital as there was already an endorsement of the doctor on the yadi (Exh. 28) that the patient was conscious. However, he does not know the name of the doctor. He had also not seen the injuries received by the patient. He does not know whether any bandages were tied on the body of the deceased or not. He admitted the fact that before recording the dying declaration, he had not verified through the doctor that the patient was conscious or not. The police had not recorded his statement.

8. From the evidence on record, it is clear that when the deceased was admitted to the hospital on the night of 18.9.1996, he was unconscious and there is no evidence of any witness whatsoever to show that deceased-Narendrasinh regained consciousness on 20.9.1996. In absence of the dying declaration recorded by the Magistrate being verified by the doctor that the patient was in a conscious condition, we are not prepared to place any reliance on such dying declaration.

9. If there was evidence in the form of the dying declaration of deceased-Narendrasinh, then, perhaps, we would have set aside the conviction. However, in this case, apart from the dying declaration of deceased-Narendrasinh, there is evidence of two eye witnesses - (1) Andubha Vajesingh, who is the father of deceased-Narendrasinh and (2) Dalsukhbhai Haribhai. Dalsukhbhai Haribhai PW 2 (Exh. 17) has stated in his evidence that he is living retired life. At the night of 18.9.1996 at about 10.30 PM, he and Madhubha had gone to see the ganesh festival. They were standing near tea stall and pan galla near Khodiyar Mata's temple. At that time, Narendrasinh and Andubha were coming on their bi-cycles from the galla of Dilipsinh. At that time, the

accused all of a sudden came running and gave knife blow on the stomach of Narendrasinh. From the distance, one cannot see every thing, but he felt that after giving one blow, he must have given another blow and thereafter Andubha caught the knife. Thereafter they went running there and Andubha took Narendrasinh to the hospital in a rickshaw. At that time crowd collected there and the accused was all alone, but he ran away. His statement was recorded by the police on 19.9.1996. However, in his cross-examination, he has denied the fact that he had not stated before the police in his statement that Andubha caught the knife. However, it is proved in the evidence of Police Inspector Shri Bhatt, who investigated the case, that this witness Dalsukhbhai had not stated in his statement before the police that Andubha caught the knife. He has also stated that he had not called this witness Dalsukhbhai and other witness Madhubha but they were brought by complainant-Andubha. Complainant-Andubha has not even referred the name of this witness Dalsukhbhai in his FIR (Exh.16) nor in his evidence before the Court that one Dalsukhbhai had also witnessed the incident. According to Dalsukhbhai, he was called by the police for recording his statement. He is a retired person and admitted that he could not see the second blow being given because there was a distance from the place of the incident. It was night hours of 10 O'clock. Therefore, in our considered opinion, Dalsukhbhai Haribhai seems to be a got up and chance witness. Therefore, in our considered opinion, no reliance can be placed on his evidence and the learned Judge has committed error in placing reliance upon the evidence of Dalsukhbhai Pw 2 (Exh. 17).

10. However, there is an evidence of injured eye witness Andubha Vajesingh. His presence at the place of the incident was natural. During the incident, he had also received injuries on his palm for which he was treated in the hospital. The incident in question took place at about 11.00 PM on 18.9.1996 and the FIR was lodged by complainant-Andubha PW 1 (Exh. 15) within less than three hours i.e. at about 1.45 AM wherein he had disclosed the name of the appellant-accused as an assailant. It is true that in the instant case the incident took place in presence of a number of persons in a crowded locality. Therefore, a number of independent persons must have also witnessed the incident. In fact, the police had recorded the statement of others, but for some or the other reasons, those independent witnesses were dropped and not examined before the trial Court. Therefore, the prosecution case depends only upon the evidence of injured eye witness Andubha Vajesingh, who is

none else, but the father of deceased-Narendrasinh. Thus, he being the most interested witness, his evidence is required to be scrutinized carefully. Andubha Vajesingh (Exh. 15) stated in his evidence that Dilipsinh Bahadursinh, brother of accused-Rajendrasinh is his son-in-law who was running a pan galla in the name of Shakti Pan Parlour. Dispute was going on between his son-in-law (Dilipsinh) and his another brother Rajendrasinh (accused) regarding the property. His son-Narendrasinh was assisting his son-in-law in running the pan galla. Narendrasinh was sitting at the galla, therefore, Rajendrasinh was envied. When they were coming near Khodiyar Mata's temple, at that time, Rajendrasinh came running with a knife in his hand and pushed his son Narendrasinh from the galla and gave one blow on his stomach. When the accused was about to give another blow, he (complainant) caught the knife. Because of that, he had received the injury between his thumb and first finger. Thereafter, Rajendrasinh ran away with the knife. Many persons collected there. Thereafter he removed his son Narendrasinh in a rickshaw to LG Hospital. During the treatment, Narendrasinh died on 21.9.1996.

11. In his cross-examination, Andubha admitted that the dispute between his son-in-law Dilipsinh and his brother-accused Rajendrasinh was going on regarding their property including residential house. He has also admitted the fact that both the parents of accused Rajendrasinh committed suicide in March, 1995 by pouring kerosene on them, but he has refused to admit the fact that because his son-in-law demanded his share from them, therefore, they had committed suicide. In his cross-examination, he had stated that he and Rajendrasinh was facing each other at the place of incident. However, he refused to admit the fact that some scuffle took place between them. He had stated that Narendrasinh did not fall after the knife blow was given to him. He also stated that when he caught the knife in his hands, the accused snatched the knife from his hands and ran away. At that time pan gallas were open and he raised shouts to catch the accused, but he did not run after him nor anyone else ran after him. He has stated in his cross-examination that the accused used to come quite often at the galla of Dilipsinh and quarrelling.

12. From the above evidence of this witness Andubha (Exh. 15), it is clear that Andubha was very much present at the place of incident. However, he was not prepared to disclose the real version. It is true that he has denied to the suggestion in his cross-examination

that no scuffle took place between them. But, we are not prepared to believe the same that no scuffle took place between them and accused-Rajendrasinh because from the wardhy (Exh. 31) dated 18.9.1996 sent at 11.30 PM by the Police Inspector, Amraiwadi Police Station on the instructions from the Chief Medical Officer of LG Hospital, it is clear that some altercation or scuffle must have taken place before the incident as the relations between the accused and the deceased and this witness Andubha were already strained and due to that, the accused must have taken out the knife and gave one blow to deceased-Narendrasinh and because of that, Narendrasinh died after three days. Thus, the case of the appellant-accused falls under Exception 4 to Section 300 IPC. Therefore, the accused could not have been convicted for the major offence under Section 302 IPC.

13. The next question is - what offence is committed by the accused ?. Would it be an offence under Section 304 Part II or Part I ?

Considering the fact that the accused selected vital part of the body of the deceased and gave one blow with a deadly weapon like knife and because of that the intestine of the deceased had come out, it suggests that there was an intention on the part of the accused to kill the deceased. Therefore, his case would fall under Section 304 Part I and not under Section 304 Part II IPC.

14. The learned Judge has convicted the accused for the offence under Section 324 IPC for giving knife injury on the palm of the witness Andubha and sentenced him to suffer one year RI and to pay a fine of Rs.250/- in default to further undergo 15 days RI. On this point, the evidence of Andubha is trustworthy. Therefore, we are of the considered opinion that the learned Judge has rightly convicted and sentenced the appellant-accused for the offence under Section 324 IPC.

15. However, as stated earlier, the accused could have been convicted only for the major offence under Section 304 Part I and not for the major offence under Section 302 IPC. In that view of the matter, the impugned order of conviction passed by the learned Judge convicting the accused for the offence under Section 302 IPC for committing murder of deceased-Narendrasinh is required to be altered and he is to be convicted for the offence under Section 304 Part I IPC.

16. Accordingly, while maintaining the order of conviction and sentence passed by the learned Judge

convicting the appellant-accused for the offence under Section 324 IPC and sentencing him to suffer one year RI and to pay a fine of Rs.250/- in default to further undergo 15 days RI. However, the order of conviction passed by the learned Judge convicting the appellant-accused for the offence under Section 302 IPC is hereby quashed and set aside and his conviction is altered from the offence under Section 302 IPC to the offence under Section 304 Part I IPC. Accordingly, the appellant-accused is convicted for the offence under Section 304 Part I IPC and sentenced to suffer ten years RI and to pay a fine of Rs.500/- in default to further undergo RI for one month. Both the sentences are ordered to run concurrently. The appellant-accused will be given set off for the period during which he has remained in jail as under-trial prisoner during the trial and after conviction in jail.

17. The appeal is partly allowed to the aforesaid extent only.

(B.J. Shethna, J.)

(M.S. Shah, J.)
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